Federal Mediation & Conciliation
Service Case No. 02-04963

C. ALLEN POOL
Arbitrator
Arbitrator's Case No. 4-24-02

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

International Brotherhood of Teamsters Local Union 533	)	ARBITRATOR'S
and	)	OPINION AND AWARD
Luce & Son Co., Inc.	)	May 3, 2002
Issue: Contract Interpretation, Overtime	)	

This Arbitration arose pursuant to Agreement between the International Brotherhood of Teamsters, Local Union No. 533, hereinafter referred to as the "Union", and Luce & Son Co., Inc., hereinafter referred to as the "Employer", under which C. ALLEN POOL was selected to serve as Arbitrator through procedures of the Federal Mediation and Conciliation Service. The Parties stipulated that the matter was properly before the Arbitrator and that his decision would be final and binding.

The Hearing was held in the City of Reno, Nevada on April 24, 2002 at which time the parties were afforded the opportunity, of which they availed themselves, to examine and cross-examine witnesses and to introduce relevant evidence, exhibits, and arguments. The witnesses were duly sworn. The Parties made oral closing arguments after which the record was closed.

APPEARANCES:

For the Union:

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Also

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For the Company:

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Also

Gerald Hicks
Luce & Son Co., Inc.

Rob Parker
Nevada Association of Employers

Richard Humes
Warehouse Manager
Luce & Son Co;, Inc.

ISSUE

After some discussion at the beginning of the hearing, the parties stipulated that the issue would be framed as follows:

Did the Employer violate Article 4, 6, 10, or 19 of the Collective Bargaining Agreement when the Employer did not pay the night shift employees time and one- half (1 ½) for all the hours they worked on the shift that started at 5:30 p.m. on, Sunday, November 18, 2001 and ended at 4:30 a.m. on Monday, November 19, 2001?

REVELENT PROVISIONS OF THE AGREEMENT

Article 4 – Wages, Section 3:

Employees working Saturday or Sunday shall receive time and one-half (1 ½) for all hours worked unless stated otherwise elsewhere in the Agreement.

Article 6 – Hours of Work and Minimum Employment, Section 1:

Forty hours in any one week shall constitute a week's work during the normal period of Monday through Friday. However, upon ten (10) days notice, the Employer shall have the option of establishing a 4-day forty (40) hour workweek for all or part of its operation subject to Union notification and the approval of a majority of the employees concerned. Likewise, upon

ten (10) days notice, the Employer shall have the option of reestablishing a five (5) day, forty (40) hour workweek for all or part of its operation subject to Union notification and approval of a majority of the employees concerned, No employee shall suffer a reduction in benefits based on the normal five (5) day or four (4) day workweek which are conferred elsewhere in this Agreement.

(A) ….All time worked in excess of forty (40) hours in each week or eight (8) hours in any one (1) day shall be considered overtime and paid for at the rate of time and one-half (1 ½)….

(B) ….All time worked in excess of forty (40) in each week or ten (10) hours in any one day (1) shall be considered overtime and paid for at the rate of time and one-half (1 ½)….

Article 10 – Pension, Section 2:

The Employer agrees to make pension contributions on straight time hours worked up to a maximum of 184 hours per month. Time paid for but not worked, including time paid, but not limited to, vacation, holidays, and sick leave, will be considered as time worked for all purposes of this Agreement.

Article 19 – Discrimination and Mutual Respect, Section 1:

The Employer agrees not to discriminate against nor deprive any individual of employment opportunities work respect to hiring, compensation, tenure, benefits and terms or conditions of employment because of such individual's Union membership or protected Union activity, race, color, religion, sex, national origin or age, or that prohibited by state or federal law, nor will they limit, segregate, or classify employees in any way to deprive any individual of employment opportunities..

BACKGROUND

The Employer is a beer and liquor distributor with operations in the Reno/Sparks area in the State of Nevada. The affected employees are a small, select group of warehouse workers who work the night shift. Their normal, weekly, forty-hour workweek consists of ten-hour shifts on the four days of Monday through Thursday. Each shift starts at 5:30 p.m. and ends at 4:30 a.m. the following morning. They are paid at the straight time rate for these forty hours. For all hours worked over these forty hours in a workweek, the employees are paid overtime at the rate of time and one-half (1 ½) (Joint Ex. 1, Article 6 (B)). In addition, the Agreement specifies that employees working Saturday or Sunday shall receive time and one-half for all hours worked (Joint Ex. 1, Article 4 Section 3).

The events that led to this arbitration began on Sunday, November 18, 2001 just prior to Thanksgiving, November 22nd. Some or all of the employees in the night shift crew were either called to or volunteered to work on Sunday, November 18th, a premium day. (The evidence record did not identify how many nor whether the assignment was voluntary or assigned.) The employees worked their normal night shift hours on Sunday, November 18th. They started at 5:30 p.m. in the afternoon and ended at 4:30 a.m. the next morning. The following Thursday, Thanksgiving Day, the night warehouse crew did not work a shift. As provided for in the Agreement, the day being a holiday, they were paid a minimum of ten hours (10) straight-time pay for the time not worked (Joint Ex. 1, Article 7).

On receiving their pay check on December 4th, the employees that had worked the night shift hours on Sunday, November 18th, learned that for the hours worked after midnight, they were paid at the straight time rate of pay and not at the overtime rate of time and a one-half. They were only paid time and one-half for the hours worked prior to midnight on November 18, 2001. A grievance was filed on December 7th and was processed to this arbitration.

POSITION OF THE UNION

The Employer violated the Agreement. There is no past practice of not paying overtime for hours worked after midnight following a Sunday, a premium day. The language in question is clear and unambiguous. The language in Articles 4 and 6 is clear as to what constitutes overtime pay. All hours worked over 40 hours in the normal workweek period of Monday through Friday shall be paid at the overtime rate of time and one-half (1 ½). In addition, Employees working Saturday or Sunday shall receive time and one-half (1 ½) for all hours work.

The warehouse night shift crew came to work on a premium workday, Sunday November 18, 2001 and worked the entire 10-hour shift. The Employees who worked that shift are entitled

to time and one-half (1 ½) for all hours worked on that shift. There is no past practice that prevails over the clear language of the Agreement.

The language in the second sentence of the Pension provision, Article 10, Section 2, is clear and unambiguous. The language pertains to the whole Agreement. It is not limited solely to the Pension provision.

The grievance should be sustained and the Employer should immediately make whole all employees who have not been compensated for overtime hours provided for in the Agreement.

POSITION OF THE EMPLOYER

The Employer did not violate the Agreement. The Employer is and has been consistent in its past practice. Premium, overtime pay is only for hours actually worked, not for time paid but not worked. Also, there is no language in the Agreement that addresses Sunday premium pay when a shift crosses over into a regular workday. If a shift crosses over from a premium payday into a regular workday, the hours worked after midnight are paid at the regular, straight-time pay rate. There is no language in the Agreement that changes this past practice.

The language in Article 10, Section 2 of the Pension provision is clear as to its intent. Specifically, the language in the second sentence of Section 2 is limited to Article 10, the Pension provision. The language does not pertain to other provisions in the Agreement. Nor is the employer in violation of Article 19, the Discrimination and Mutual Respect provision of the Agreement. The Employer has been and is respectful towards all employees and treats all employees equally. The Grievance should denied.

DISCUSSION

This arbitration was a contract interpretation issue that involved not a past practice question as put forth the Employer, but the question of what was the intent of two instances of

new, negotiated language added to the current Agreement by the parties in their last negotiations. The first was language, a sentence that ultimately was added to Section 1 of the Pension provision, Article 10. The second was language, a sentence that was designated as Section 3 in Article 4, Wages. Unfortunately, parties all too often do not hold precisely the same understanding of a negotiated term or phrase. Thus, the arbitration process comes into play with the goal of determining the intent of the parties at the time they agreed to the disputed language.

Turning first to the new language added to the Pension provision, I will preface my remarks with an important fact about the collective bargaining process. That is, the parties involved in the process are familiar with the employee and the business problems in respect to which they seek agreement. Therefore, when a tentative agreement is reached, the presumption is that both parties knew what the language was expected to accomplish. The language in question became the second sentence of Section 1 of Article 10, Pension:

> The Employer agrees to make pension contributions on straight time hours worked up to a maximum of 184 hours per month. *Time paid for but not worked, including time paid, but not limited to, vacation, holidays, and sick leave, will be considered as time worked for all purposes of this Agreement* (Emphasis added).

The Employer's contention was that the language emphasized above was limited to and pertained solely to the Pension provision of the Agreement. The Union contended that the language pertained to the whole Agreement. The answer was found in the bargaining history and notes from their most recent negotiations.

The new language was part of the Union's initial bargaining proposal (Union Ex. 1). It was, however, first offered for discussion and inclusion as Section 8 of Article 3, General Provisions, not as part of the Pension provision. The discussions that took place between the parties on the proposal were recorded in the Union's bargaining history and notes (Union Ex. 2). (The Employer did not offer any bargaining history and notes into the evidence record.) After

studying the Union's detailed and comprehensive record of the negotiations for each proposal offered by the Union, I was convinced that their exhibit (U-2) was a reliable representation of what was agreed to and not agreed to at the negotiations. Also, the Employer did not challenge the correctness of the Union's bargaining history and notes.

The Union' Chief Negotiator, when asked by the Employer's bargaining team, why the Union wanted this language in Article 3, General Provisions, he responded with:

"We put it here so we don't have to restate it over and over again in the other articles like sick leave, holidays, vacation, etc. The Pension and (?) funds, require it too. You already pay O/T after 8 hrs, 10 hrs and Saturday and Sundays, so it does not impact the Company & is not an issue for you. If an (employee) is off sick for 2 days, Mon. & Tues., he's paid 16 hours sick leave pay, and if he works Wed, Thurs. & Fri, paid 24 hrs. actual work time which gives him a total of 40 hours. All this counts as time worked. If (employee) works on Saturday, it's all O/T hours even though he only actually worked 24 hours in the week Mon.-Fri."

The Employer's response to the above was, "*We already do this now."* When asked by Employer what the phrase "*limited to, means?*" the Union replied, "*Any time not worked. I didn't list all of them but it also would be paid funeral leave, jury duty and any other type of paid status for hours not worked.* The Employer then stated/requested, "*Move it to the Pension Section*". The Union responded to this with, "*Why? If I do it, it won't change anything and it won't be limited to Pension only. You do it now anyway. I'll risk it but you better make a note in your bargaining records of what our intent is, otherwise we'll have a problem, then we can refer back to our notes. I'm (writing) it as a matter of record here and in the Union proposal* (Union Ex. 2, pages 14-15).

Following this exchange, it was agreed to move the sentence, with no modifications, to the Pension provision, Article 10, Section 1. The Union's chief negotiator also noted in the margin of his bargaining history and notes the following, "*Section 8 moved as (Company) requested but with understanding movement does not change the meaning or intent that it*

applies to everything not just to Pensions, otherwise, it would state 'for all purposes of this article"" (Union Ex. 2, page 5).

The evidence record did not support the Employer's contention. Even though, the language was moved, as requested by the Employer, to the Pension provision the language pertains to the whole Collective Bargaining Agreement. If the Employer had intended that the language be limited to Article 10, they should have inserted language which would have limited it solely to Article 10, Pensions. This was not done.

The second instance of new, negotiated language added to the current Agreement was Article 4, Wages, Section 3:

Employees working Saturday or Sunday shall receive time and one-half (1 ½) for all hours worked unless stated otherwise elsewhere in the Agreement.

The Employer's contention was that the hours of a shift worked after midnight on a Sunday premium day shall be paid not the overtime rate but the straight-time rate. Their contention was that this was established past practice. They also contended that a shift is not a day, that there is no language in the Agreement that defines a Saturday or Sunday, and that there is no language that provides for hours of a shift worked after midnight to be paid at the overtime rate. To put it another way, they stated that if a premium Sunday shift crosses over into a regular workday, a Monday, those hours are paid at the straight-time rate.

The Employer's contention was not persuasive for two reasons. First, the Employer did establish the existence of a past practice. Specifically, they did not put into the evidence record any showing that the pattern of conduct was (a) clear and consistent over a reasonable period of time and (b) that there was a mutual acknowledgement and acceptance of the pattern by the parties.

Second, the language in Article 4, Section 3 does not stand alone. Unless there is explicit

language to the contrary, and there is not, the language must be interpreted within the context of the Agreement as a whole. Fortunately, guidance to the Arbitrator in addressing this issue was provided by the Parties. There was other language in the Agreement that addressed the question of shift work that crosses over from a premium day to a regular workday. That language was found in Article 7, Holiday Pay, Section 6 and reads, in part:

"*Employees called in to work* on a contract holiday other than Christmas Day will be guaranteed to work their regular consecutive eight (8) hour or (10) hour shift and receive pay for same ……). Employees *shall start at their regular scheduled start times*, *and all work commenced on a holiday* ***will be paid*** *at one and one-half (1 ½) times the regular straight-time rate of pay* ***for the entire*** *eight (8) hour or (10) hour* ***shift*** which shall be paid in addition to …" (Emphasis added) (Joint Ex. 1).

Finding no language to the contrary, my conclusion is that the above language established a standard to be followed for paying the overtime rate of pay for an entire shift when a shift commences on a Sunday, premium day and crosses over into a regular workday, a Monday. Sunday is a premium day, the same as a holiday. To pay overtime for an entire shift that starts on a holiday but not on a Sunday premium day would create an anomaly that is to be avoided in contract interpretation.

There was one additional issue, put forth by the Union, that should be addressed. The Union alleged that the Employer, in addition to non payment of overtime, violated Article 19, Discrimination and Mutual Respect, of the Agreement. This allegation was completely without foundation. Nothing was offered into the record in support of the allegation. I must conclude that the Employer has and does treat the employees equally and with respect. In fact, it was obvious to the Arbitrator, by the behavior of the parties on both sides of the table at the hearing, that the parties have a high level of respect for each other that is to be commended.

The grievance is sustained. For the reasons discussed above, my conclusion is that the Employer violated Collective Bargaining Agreement when it failed to pay the crew members of

the warehouse, night crew time and one-half (1 ½) for the for the entire shift worked on Sunday, November 18, 2001.

AWARD

The Grievance is sustained. The Employer violated Article s 4, 6, and 10 of the Collective Bargaining Agreement when the Employer did not pay the warehouse, night shift employees time and one- half (1 ½) for all the hours they worked on the shift that started at 5:30 p.m. Sunday, November 18, 2001 and ended at 4:30 a.m. Monday, November 19, 2001.

REMEDY

The Employer shall immediately make whole all employees of the warehouse, night shift crew who have not been compensated for the overtime hours worked on Sunday, November 18, 2001. The Arbitrator retains jurisdiction over this matter with regards to any dispute that may arise in implementing the remedy.

Date: _____

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C. ALLEN POOL
Arbitrator